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8 UNITED STATES DISTRICT COURT
 9 SOUTHERN DISTRICT OF CALIFORNIA
 10 (HONORABLE BARRY TED MOSKOWITZ)

11 UNITED STATES OF AMERICA,)	CASE NO. 08CR1600-BTM
)	
12 Plaintiff,)	Date: August 8, 2008
)	Time: 2:30 p.m.
13 v.)	
)	
14 ANGELICA SAINZ-LOPEZ,)	DEFENDANT'S MEMORANDUM REGARDING
)	BREACH OF THE PLEA AGREEMENT
15 Defendant.)	
)	

16
 17 TO: KAREN P. HEWITT, UNITED STATES ATTORNEY;
 TARA MCGRATH, ASSISTANT UNITED STATES ATTORNEY; AND
 18 KENNETH YOUNG, UNITED STATES PROBATION OFFICER:

19 Over thirty-five years ago in *Santobello v. New York*, 404 U.S. 257 (1971), the Supreme Court made
 20 clear that because the criminal accused waive their Constitutional rights when they plead guilty, plea
 21 agreements are special contracts and, “when a plea rests in any significant degree on a promise or agreement
 22 of the prosecutor, so that it can be said to be part of the inducement or consideration, *such promise must be*
 23 *fulfilled.*”¹ *Id.* at 262. Here, when she plead guilty, Ms. Sainz-Lopez agreed to waive all of the following
 24 rights: the right to indictment by grand jury, the right to file or argue substantive motions, the right to proceed
 25 to trial as well as the right to appeal or collaterally attack the plea, conviction or sentence. *See* Docket No.
 26 15 (“Plea Agreement”). She also agreed to entry of an order removing her from the United States. *Id.* In
 27 exchange for giving up all these rights, the government promised to recommend that she “be sentenced to the
 28 low end of the advisory guideline range *as calculated by the government* pursuant to this agreement.” *Id.*

¹Unless otherwise noted all emphasis is added.

1 at 10. The government calculated the total offense level as 9. *See id.* at 8. Thus, because Ms. Sainz-Lopez
 2 has zero criminal history, the government promised her it would recommend 4 months custody in exchange
 3 for her guilty plea.

4 In spite of its explicit promise to recommend 4 months, the government has recommended that Ms.
 5 Sainz-Lopez be sentenced to 6 months custody. *See* Docket No. 25 (“Government’s Sentencing
 6 Memorandum”). This is a breach. Although plea agreements are contractual by nature and are measured by
 7 contract law standards, “[a]s a defendant’s liberty is at stake, the government is ordinarily held to the literal
 8 terms of the plea agreement it made.” *United States v. Transfiguracion*, 442 F.3d 1222, 1228 (9th Cir. 2006)
 9 (citing *United States v. Packwood*, 848 F.2d 1009, 1012 (9th Cir. 1988)). The government as drafter of the
 10 agreement, is responsible “for any lack of clarity” *United States v. Franco-Lopez*, 312 F.3d 984, 989 (9th
 11 Cir. 2002) (quoting *United States v. Anderson*, 970 F.2d 602, 607 (9th Cir. 1992), *as amended* 990 F.2d 1163
 12 (9th Cir. 1993)). “Ambiguities are therefore construed ‘in favor of the defendant.’” *Transfiguracion*, 442
 13 F.3d at 1228 (quoting *Franco-Lopez*, 312 F.3d at 989). The Ninth Circuit instructs that in construing the
 14 agreement the Court must look to what Ms. Sainz-Lopez “reasonably believed to be the terms of the plea
 15 agreement at the time of the plea.” *See Franco-Lopez*, 312 F.3d at 989.

16 Clearly, under this agreement, Ms. Sainz-Lopez reasonably expected that the government would
 17 recommend she be sentenced “to the low end of the advisory guideline range ***as calculated by the government***
 18 pursuant to this agreement.” Plea Agreement at 10. Here, because the government calculated the guideline
 19 range as an adjusted offense level of 9, Ms. Sainz-Lopez reasonably believed the government would
 20 recommend she be sentenced to 4-months. However, the government has recommended 6-months claiming
 21 it made either “a typographical error or a simple clerical mistake,” when it drafted the plea agreement and
 22 really meant to write adjusted offense level of 10. *See* Government’s Sentencing Memorandum at 2. The
 23 government says that because it made what it calls a legal error in drafting the plea agreement, it is not bound
 24 by the promises it made. *Id.* The government misunderstands the law of plea agreements.

25 In *Franco-Lopez*, the Ninth Circuit emphasized that:

26 A defendant is entitled to the benefit of his or her plea bargain and sentencing pursuant to
 27 a plea bargain must be attended by safeguards to insure the defendant what is reasonably
 28 due in the circumstances. Those circumstances will vary, but a constant factor is that when
 a plea rests in any significant degree on a promise or agreement of the prosecutor, so that
 it can be said to be part of the inducement or consideration, such promise must be fulfilled.

312 F.3d at 989 (quoting *Santobello*, 404 U.S. at 262). When the government breaches a plea agreement, the defendant is entitled to specific performance of the agreement which requires resentencing in front of a different judge. *Id.* at 994. The good or bad faith of the government counsel is irrelevant to the decision of whether her conduct constituted a breach of the terms of the agreement. *Id.* at 992; *see also Santobello*, 404 U.S. at 262 (that a breach was inadvertent does nothing to lessen its impact).² This Court's "interpretation of the plea agreement between [Ms. Sainz-Lopez] and the government, then, *must* secure the benefits promised [Ms. Sainz-Lopez] by the government in exchange for surrendering [her] right to trial." *Id.* at 989.

In essence, the government argues that based on the doctrine of mutual mistake of law, it is entitled to rescind the plea agreement -- or, at least the portion relating to its sentencing recommendation. *See* Government's Sentencing Memorandum. However, the Ninth Circuit has repeatedly rejected substantially similar mutual mistake arguments. *See Transfiguracion*, 442 F.3d at 1228-30; *United States v. Barron*, 172 F.3d 1153 (9th Cir. 1999) (en banc); *United States v. Zweber*, 913 F.2d 705, 711 (9th Cir. 1990).³ "[I]t would be inappropriate to extend the application of ordinary contract law principles so far as to permit the government to claim the defense of mutual mistake." *Transfiguracion*, 442 F.3d at 1229. In *Barron* the Court observed:

A plea bargain is not a commercial exchange. It is an instrument for the enforcement of the criminal law. What is at stake for the defendant is his liberty. . . . What is at stake for the government is its interest in securing just punishment for violation of the law and its interest that an innocent act not be punished at all. The interests at stake and the judicial context in which they are weighed require that something more than contract law be applied.

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² As the Ninth Circuit has explained:

We note that, as in any other breach of contract situation, to say that one party breached the contract is not to ascribe to that party bad faith. It is precisely because the parties to a contract do not always agree about the contract's meaning that courts are enlisted in interpreting them. That we invariably end up disagreeing with one party's interpretation or the other's is not to ascribe a failure to act in good faith to the party with whom we disagree.

Franco-Lopez, 312 F.3d at 992 n.5.

³ *Zweber* was superseded on other grounds by amendment, U.S.S.G. app. C, amend. 345, as recognized in *United States v. Webster*, 996 F.2d 209, 211 (9th Cir. 1993).

1 *Barron*, 172 F.3d at 1158. Simply put, “[t]he nature of a plea agreement is simply too complex to support
 2 *the doctrine of mutual mistake.*” *Transfiguracion*, 442 F.3d at 1230. Thus, here, the government’s error
 3 “cannot void an otherwise valid plea agreement,” *id.*, and the government is required by law to recommend
 4 Ms. Sainz-Lopez be sentenced to 4-months.

5 Finally, the importance of enforcing plea agreements can not be overstated. In *Camarillo-Tello*, the
 6 Ninth Circuit explained:

7 The idea is that when the sentencing court hears that both sides believe a certain sentence
 8 is appropriate and reasonable in the circumstances, this is more persuasive than only the
 9 defendant arguing for that sentence. Presenting this "united front" is the defendant's benefit
 10 of the bargain. It is not always much of a benefit, as the sentencing courts do not have to
 follow the joint recommendation. Nevertheless, the chance that the court will follow the
 joint recommendation is often the basis upon which defendants waive their constitutional
 right to trial.

11 236 F.3d at 1028. When considering the government’s responsibilities with respect to plea agreements the
 12 Ninth Circuit has emphasized that, “[t]he integrity of our judicial system requires that the government *strictly*
 13 *comply* with its obligations under a plea agreement.” *United States v. Mondragon*, 228 F.3d 978, 981 (9th
 14 Cir. 2000). This simple proposition recalls the eloquent words of Justice Louis Brandeis:

15 Decency, security and liberty alike demand that government officials shall be subjected to
 16 the rules of conduct that are commands to the citizen. In a government of laws, existence
 17 of the government will be imperiled if it fails to observe the law scrupulously. Our
 government is the potent, omnipresent teacher. For good or for ill, it teaches the whole
 people by its example.

18 *United States v. Olmstead*, 277 U.S. 438, 485 (1928) (dissenting opinion of Mr. Justice Brandeis). Here, Ms.
 19 Sainz-Lopez did not receive the benefit of her bargain when, at sentencing, the government recommended 6
 20 months custody. Because the government failed to strictly comply with the plea agreement it breached and,
 21 the Court must order specific performance of the plea agreement in front of a different sentencing judge. *See*
 22 *e.g., Camarillo-Tello*, 236 F.3d at 1028.

23 Respectfully submitted,

25 DATED: August 4, 2008

26 /s/ Robert R. Henssler
ROBERT R. HENSSLER JR
 27 Federal Defenders of San Diego, Inc.
 Attorneys for Ms. Sainz-Lopez
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CERTIFICATE OF SERVICE

Counsel for Defendant certifies that the foregoing pleading is true and accurate to the best of his information and belief, and that a copy of the foregoing document has been served this day upon:

TARA MCGRATH
ASSISTANT UNITED STATES ATTORNEY; AND
tara.mcgrath@usdoj.gov

A courtesy copy will be sent via electronic email to:

KENNETH YOUNG,
UNITED STATES PROBATION OFFICER:

Dated: August 4, 2008

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